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JAMES H. McKENNEY,
Clerk.

No. 60.

Brf. of Mattingly, Miller & Ridout for P. E.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

Filed Oct. 15, 1900.

No. 60.

AARON BRADSHAW, PLAINTIFF IN ERROR,

vs.

NEHEMIAH B. ASHLEY.

BRIEF FOR PLAINTIFF IN ERROR.

WM. F. MATTINGLY,
WM. JNO. MILLER,
JOHN RIDOUT,
Attorneys for Plaintiff in Error.

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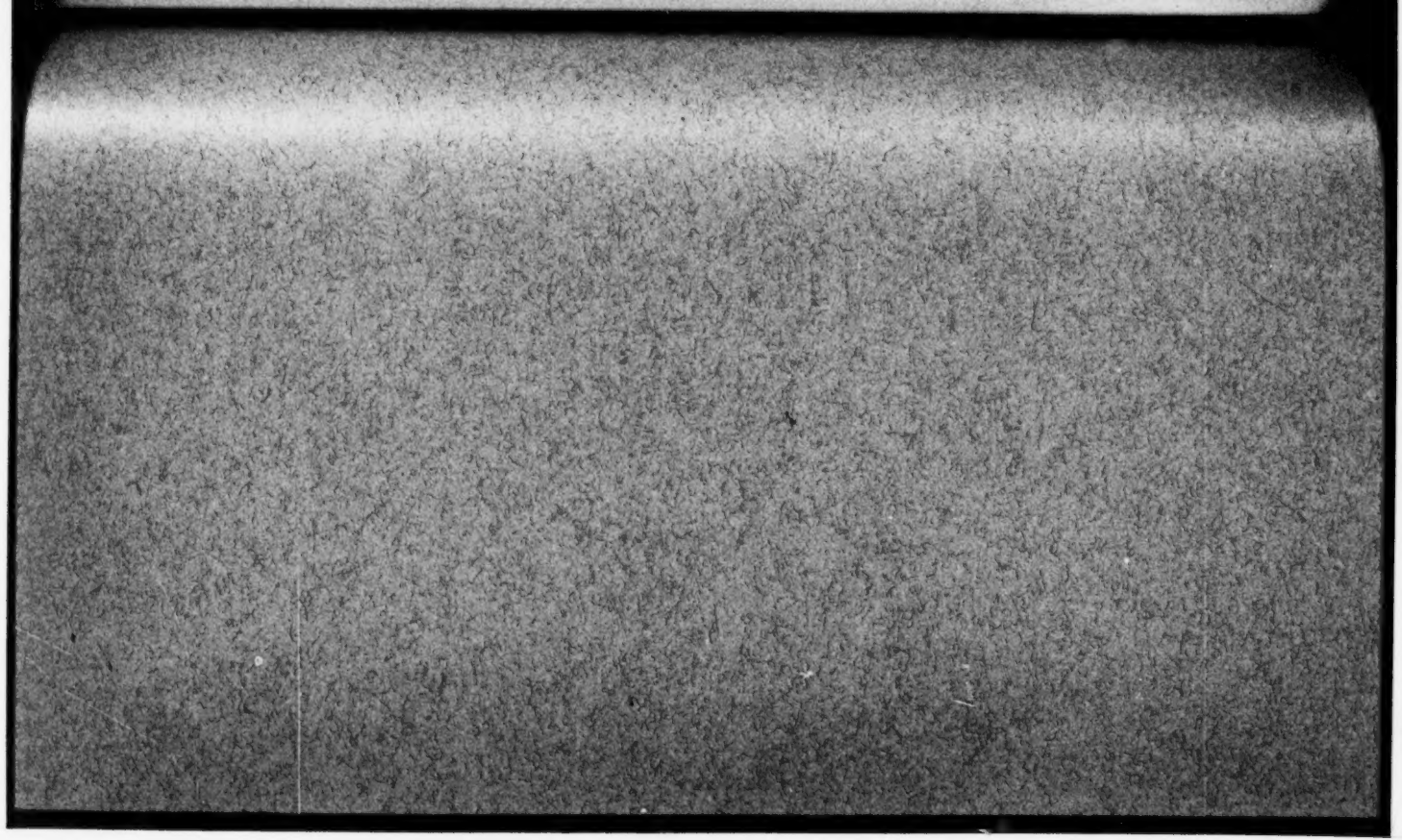

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BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This was an action of ejectment brought by Ashley *vs.* Bradshaw, in which three declarations were filed, as follows:

Declarations.

Original, filed October 13, 1891.

> To recover an undivided one-fifth of a certain parcel of land in the city of Washington "*known as original lot one in square numbered 939, according to the plan or plat of said city,* and otherwise known and designated as lot numbered 4 in said Square 939, according to the subdivision of said square recorded in Liber C. R. B. at folio 41 of the records of the Surveyor's office of the District of Columbia, said lot being bounded as follows," viz: giving the metes and bounds of which the plaintiff was lawfully possessed on the 27th day of March, A. D. 1891, when the defendant entered the same and unlawfully ejected the plaintiff. Plaintiff claims in fee simple.

Amended declaration, filed March 11, 1893.

To recover an undivided one-fifth of each of *original Lots 20, 1, 2, and 3, in Square 939, according to the plan or plat of said city*, and otherwise known as Lots 3, 4, 5, and 6 in said square, according to the subdivision, etc., same as in original. Claims in fee simple.

Entry and ouster alleged on March 27, 1891.

Second amended declaration, filed October 26, 1896.

1st count. To recover an undivided one-fifth of certain parcels of land sometimes designated and described as Lots 1, 2, and 3 in Square 939, and also sometimes designated and described as Lots 4, 5, and 6 in said square, according to a *so-called subdivision* thereof recorded in Liber C. H. B., folio 41, of the records of the surveyor's office.

And to recover an undivided one-fourth part of that certain other parcel in said square, sometimes designated and described as Lot 20 and sometimes as Lot 3 of said so-called subdivision, the whole of said four lots being the southwest part of said square, fronting 115 feet 10¾ inches on North B street by a depth of 186 feet 2 inches fronting on East Ninth street.

Entry and ouster alleged March 27, 1889, and claims possession in fee simple.

2d count. Is for rents and profits.

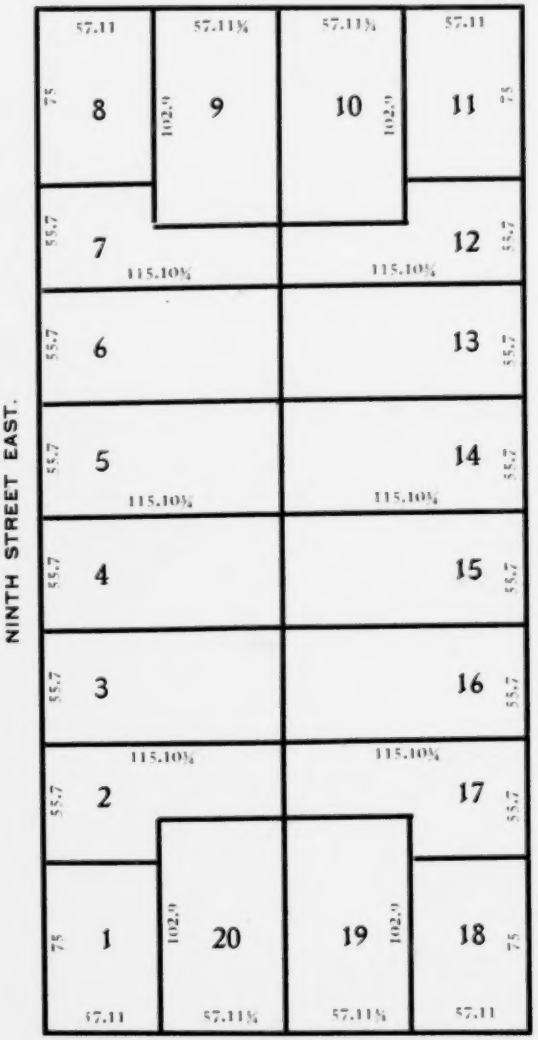
3d count. Same as the first except that the entry and ouster alleged is on November 28, 1890.

4th count. Is for rents and profits.

The original plat of Square No. 939, offered in evidence

SQUARE No. 939.

NORTH C STREET.



NINTH STREET EAST.

TENTH STREET EAST.

NORTH B STREET.

L. S. A.—1895. LAW REP. CO.

by the plaintiff, (John Stewart, witness, R. pp. 7 to 15 inc.) appears on opposite page.

Under the certificate of division between the United States and George Walker, original proprietor, Lots 1, 2, 3, 10, 11, 12, 13, 14, 15 and 20 remain to said George Walker, and Lots 4, 5, 6, 7, 8, 9, 16, 17, 18, 19 go to the United States (R., 7, 8). On this plat there also appeared pencil numbers beginning at the southeast corner of the square; pencil No. 1 being Lot 18, No. 2 Lot 19, and so on.

The admissibility of the pencil numbers on the plat was objected to (R. 9) for reasons stated, and—

> "it was then stated by the court, with the acquiescence of counsel on both sides, that everything relating to pencil numbers should go in, subject to the same objection and exception, without repetition of the same."

The pencil numbers were essential to the plaintiff, in the deraignment of his alleged record title.

Pencil Numbers.

The plaintiff, claiming a record title under the pencil numbers, offered and had admitted in evidence under the objections and exceptions reserved by the defendant (R. 9), the following: The original certificate and the record of the division between the United States and the original proprietor of Square 939, October 13, 1792, showing the ink numbers of the lots beginning at the southwest corner of the square and pencil numbers beginning at the southeast corner of the square (R. 7, 8).

JOHN STEWART, assistant to the officer in charge of the records, testified (R. 7 *et seq.*) that he did not know how or when the pencil numbers came on these records; that he had rubbed them off, and, at the instance of one of the counsel for the plaintiff and by direction of Col. Wilson,

then in charge, had restored them, appending an affidavit explaining the circumstances. That certain lots in square 939 on this plat in Register of Squares No. 2, are enclosed with pinkish lines. That indicates that the lots within the shading were sold by the United States. The same thing appears on the other squares on the register invariably when they were sold. In Square 939 the lots enclosed in pink shading are ink Lots 4, 5, 6, 7, 8, 9, 16, 17, 18 and 19.

The plat of Square 749 (R. 12), the certificate of division, September 27, 1797, showing that the whole square went to the United States. The pink tinging includes the whole square. Throughout this book, where property was allotted the United States on the division of squares, the lots that went to the Government are enclosed within these colored lines.

That in 1852 (R. 11) plats of the squares and lots of the city of Washington were printed pursuant to resolutions of the Senate of the United States. Square 939 in this Senate book (R. 13) shows that Lot 1 is at the southwest corner. Throughout these books, registers numbered 1, 2 and 3, the statement as to the division of numbers of the lots and squares is in ink in every case. There are other squares where in the original division Lot 1 is not at the southeast corner. (Ex. B., R. 156). In Squares 825 and 776 the shade was put on the wrong side.

Sections 472 and 473, Rev. St. D. C. (original act, 1809), declaring that the office of the Surveyor of the District is the legal office of the record of the plats of all property in

the city of Washington, and all records of the division of squares and lots between the public and original proprietors; and that all records of the division of squares and lots heretofore made between the public and original proprietors shall be kept in the office of the Surveyor of the City (R. 15).

JAMES H. FORSYTH (R. 16) clerk in the office of the Surveyor, Wm. Forsyth, his father, off and on since 1858, continuously since 1881:

From the books of the office have become familiar with the signatures of the different surveyors. According to the records, De Kraft was surveyor in 1822, and for possibly eight or ten years thereafter. There are four books in the office which have been treated by examiners of titles as the original records of the division of property in the different squares in the city. Have here record of Square No. 3 from the surveyor's office. It has been in his office since 1855, when I went there. It is marked on the outside "Records of Squares," then the figure 3, and then 650–975. On page 939 is the record of Square 939. Does not know that these records in the surveyor's office are simply copies of the original reports in the office of the Commissioner of Public Buildings and Grounds. I know there has been correspondence between my father, the surveyor, and the chief of engineers, in which my father has claimed that his office is legally entitled to the original records which are in the office of the Chief of Engineers. Of my own knowledge, I don't know that these records in the Surveyor's Office are mere copies. The first time my attention was called to the fact that there were two sets of numbers, pencil and ink, on this square, was at the last trial of this case. Can't say whether or not they have been there all the time. The record of Square 749, on page 749, was then read in

evidence and exhibited to the jury (R. 18), showing Lot 1 in southeast corner.

There is a book in the surveyor's office which contains several squares purporting to be made by Mr. De Kraft. The book identified. In my opinion the whole of the writing and lettering in regard to Square 939 was done by De Kraft. Square 939 in the De Kraft book offered in evidence, showing the square to be upside down and Lot 1 at southeast corner (R. 19). Also Square 749 upside down and Lot 1 at southeast corner. Everybody has access to the records of squares in the surveyor's office. Anybody might put pencil numbers on any of those squares while we were engaged in something else. The De Kraft book was consulted sometimes by examiners of titles. There might be a difference in distance and figures; there might be a doubt, and I have shown the De Kraft book in cases of that kind. I would show it when asked for in such cases (R. 19). Ordinarily the examiners would consult the original book.

The message of James H. Blake, Mayor, to the Board of Aldermen and Common Council, dated October 8, 1816. (R. 21). Which shows that there was at that time a Public Surveyor as well as a Surveyor of the Corporation, and recommending an appropriation not exceeding $300 for the purpose of procuring a book of squares for the City Surveyor. A resolution, (October 12, 1816), of the Board of Aldermen and Common Council directing the Mayor to employ some skillful and competent person to make a copy of the squares and lots of this city.

Another resolution, (March 21, 1817), authorizing the

Mayor to advance to Cornelius F. De Kraft $200, part of the compensation for the purpose of making a copy of the squares of the city and the graduation of streets; and another resolution, (May 26, 1817), appropriating $100 for compensating Frederick Cornelius De Kraft for copying the squares and graduations of the city, to be paid on completing and delivering of the copies to the Mayor of the city.

Also a warrant, (August 14, 1818), on the Treasurer of the City of Washington, to pay F. C. DeKraft $100 for copying the squares of the city: endorsed "F. C. De Kraft." also "Bank of Washington, August 14, 1818. Pay the within Henry Whetcroft, Treasurer of the City of Washington."

JOHN STEWART recalled (R. 24).

Square 939 is recorded in Book No. 2, Register of Squares. Does not know of any Book No. 3. There are only two volumes of Registers of Squares in my office. They have not been bound since they were in the office. I don't know whether originally they were in one, two, or three volumes. Under the authority of Col. Wilson, the officer in charge of public buildings and grounds, I prepared a report showing what number of lots in the City of Washington belonged to the United States. Col. Wilson reported it to the Attorney General, who sent it to the Senate, and the Senate ordered it printed. In preparing that statement, I went over the records in the office to ascertain what property went to the Government under the original division, and what disposition had been made of it. In doing this I paid no attention to the pencil numbers or marks at all. There were a number of pencil marks on these records, which from time to time I had erased.

JAMES H. FORSYTH recalled (R. 25).

On comparing the record of Square 939 in the De Kraft book with the record of the same square in Record Book 3 of the surveyor's office, I find that the De Kraft book does not correspond with the ink numbers in the record book. Square 582 in the De Kraft book does not correspond with the same square in Record Book 2 of the surveyor's office.

That in the four records of squares in the office of the surveyor the first square in No. 3 is Square 649, folio 649; the last square is No. 975, folio 975; and that the three Registers of Squares from the office of the Commissioner of Public Buildings and Grounds, the first Square in Vol. 2 is Square 559, and the last is Square 1129; and the first in Vol. 3 is Square 1132, and the last Square South of Square 990.

JOHN STEWART recalled (R. 30).

I have with me the book showing the sales of these lots in Square 939. On pages 174–175 in this book is the following:

> "Account of sales of City lots. Current account, period 1851. July 14, by cash, received of Wm. D. Baldwin for lots numbered 4, 5, 6, 7, 8, 9, 16, 17 and 19 in Square No. 939, containing 51,855 square feet at ¼ cents per foot, $129.64."

WILLIAM FORSYTH, Surveyor of the District (R. 31).

Will be 77 years old next August. Have lived in Washington since 1850. Have been connected with the surveyor's office since the fall of 1850. Was elected Surveyor of the City in 1857. Since 1857, have been out of office twice; first time for two years and second for about four years. These four books all called Records of Squares were in the surveyor's

office when I first had any acquaintance with it. From the books I have become acquainted with the handwriting of a former surveyor named De Kraft. He was then United States Surveyor. There is a book in the office, the whole of which is in his handwriting. It has been there since 1850 or 1854. Have no knowledge when the pencil or ink numbers in Square 939 were put in the Records of Squares in my office. The four books entitled Records of Squares, numbered 1, 2, 3 and 4, show the different squares comprising the city of Washington only. I do not know where they came from, nor whether they are copies from the originals in the office of the Commissioner of Public Buildings and Grounds. I have no information on that subject. *In exercising the duties of my office, I have never paid any attention to the pencil figures on Square 939.*

Record Evidence.

The record of the chancery suit in Maryland, Thomas Morris et al. *vs.* James Greenleaf et al. (R. 54), showing the appointment of John Kilty and Josiah M. King, by decree of October 19, 1806, as trustees to sell Squares 777 to 1076, both inclusive, in the city of Washington. Said trustees reported the sale by them to James Davidson of Lot 18 in Square 939. Lot 18 is described as containing 4,343¼ square feet; and that Lots 4, 5, 6, 7, 8, 9, 16, 17, and 19 in Square 939 were sold by said trustees to United States Superintendent Thomas Monroe. Exhibit 5 in said proceedings shows in reference to Square 939: original proprietor, George Walker; amount of the whole, square feet 112,360; lots belonging to the commissioners on a division with the original proprietor and selected by Morris and Nicholson, 4, 5, 6, 7, 8, 9, 16, 17, 18, 19; amount of lots, square feet, 56,180; when divided, 13th October, 1792; when recorded, 13th October, 1792.

Lot 18, Square 939. (R. 39.)

Deed from Kilty and King, trustees, to James Davidson, May 14, 1810, and mesne conveyances under Davidson to Reede Bradley, April 23, 1853.

Reede Bradley to Elijah H. Eakle, dated November 15, 1855, conveying the south half of said Lot 18 as laid down, numbered and described on the ground plat or plan of the City of Washington.

MARY F. EAKLE (R. 39), witness for plaintiff, gave evidence to prove she was the widow of Elijah H. Eakle. That the wife of Reede Bradley is her sister. That Reede Bradley built a house on the north half of pencil Lot No. 18, and that in 1856 her husband built adjoining the Bradley house, on the south half of the lot. That Bradley moved into his house in the fall of 1853. I never heard the lot called 15 until 1865 or 1866. In 1892 I conveyed Lot 18 to Mr. Slater. He said he had a title from the Walker estate to the land where I was. He called it 15. Said he wanted the corner lot down there, and that my record title was for that lot. He gave me $1,200 and a deed for Lot 15 for a quitclaim deed of my title to Lot 18. I told him I never claimed that lot. John Chester and Mr. Slater both gave me a quitclaim deed to Lot 15.

The plaintiff, in further attempting to show a record title, offered and had admitted in evidence the following deeds, to the admissibility of each of which exception was taken (R. 42):

1809, March 10. John Kilty and Josiah W. King, Trustees, to Thomas Munroe, United States Superintendent. Lots 4, 5, 6, 7, 8, 9, 16, 17 and 19, Square

939. (Lot 18 had been previously sold and conveyed to Davidson.)

1851, July 14. United States to William T. Baldwin. Same lots.

1856, February 13. William T. Baldwin to Christopher Ingle. Same lots, in trust for Mary Baldwin, etc., and to sell and convey, at her written request, to whomsoever she may designate.

1872. Christopher Ingle and Mary Baldwin to Joseph R. Ashley. Lots 4, 5, 6, 7, 8, and 9, Square 939.

Parol evidence was given tending to prove the death of Joseph R. Ashley and that the plaintiff was one of five heirs at law.

Tax Title.

The following record evidence was also offered by the plaintiff over the defendant's several objections and exception taken. R., 26 *et seq.*):

1822. August 10, deed from the corporation of Washington to William Brent of Lots 1, 2, 3, 10, 11, 12, 13, 14, 15 and 20, sold for nonpayment of taxes.

By mesne conveyance this tax title to Lots 13, 14, and 15, in 1827, vested in William Lowe; in 1833, in Martha A. Austin and Jane Lowe; in 1838, Lots 10, 11, and 12, in John A. Smith; in 1846, Lots 10 to 15, in Martha A. Austin; in 1859, in John Hardy, trustee, and in 1872 Hardy conveyed to John Chester.

Parol evidence was introduced by plaintiff tending to show that the Lowes and Smiths under the conveyances entered into possession of the six penciled numbered Lots 10 to 15 at the north end of the square.

Lots 1, 2, 3, and 20 under this tax deed remained in William Brent. In 1844 William Brent conveyed Lo. 3 to John Carroll Brent.

Plaintiff introduced, under objection and exception (R., 37), the record in Equity cause No. 738; Chancery rules No. 5; bill filed March 31, 1851, showing, in substance, that Wm. Brent died in 1848 seized, as was claimed, of certain real estate, including Lots 1, 2, and 20, Square 939, leaving surviving his widow and certain named heirs at law; decree of June 29, 1851, appointing John Carroll Brent trustee to make sale of the real estate, and the ratification in 1875 of sale made by him of Lot 1, Square 939, described in his report *as situated at the northwest corner of B and Tenth streets*, to Margaret Murphy.

Also, the records in Equity causes 5632 and 6469, proceeding for partition in 1879 among the Brent heirs, in which Lot 20, *fronting on Tenth street*, was assigned to Mrs. Virginia Chilton, *nee* Brent, and that Lot 2, *fronting on B street*, was subdivided into Lots A, B and C, of which Lot A was assigned to Emily Brent, and Lots B and C to Clementina Brent.

It will be observed that these proceedings treated the lots as referring to the pencil numbers.

By deeds offered in evidence (R. 28), from heirs at law of Wm. Brent, dated in 1850, 1853 and 1867, the tax title to Lots 1, 2 and 20, became vested in Elizabeth Brent, under whose will, dated July 10, 1861, probated April 11, 1863, Charles E. Brent and Francis N. Brent took as devisees Lots 1, 2 and 20.

Deed dated August 6, 1868, from John Carroll Brent to Morris Downs of "lot or piece of ground situated in said city of Washington known on the plat thereof as Lot number 3, in Square 939." (R. 52).

Deed dated June 5, 1879, from Morris Downs to Robert C. Campbell, of Lot 3, fronting 57 feet 11¼ inches on B street, by 102 feet 9 inches in depth.

This was an attempt to change Lot 3, ink number, to Lot 3, pencil number.

Deed dated September 5, 1881, from Robert C. Campbell to Morris Downs. Lot 3 described as above.

Deed dated October 28, 1881, from Morris Downs to James A. Ashley, Nehemiah B. Ashley, Sarah E. Beardsley and Mary A. Breckenridge. Lot 3. No particular description.

Record of subdivision by Clementina Brent and Emily Brent (R., 61) of Lots A, B, and C into Sublots 27, 28, and 29, the latter being the west 17 feet 11¼ inches of Lot 2, and Lots 27 and 28 having each a frontage of 20 feet on B street.

Deed dated November 24, 1881, from Clementina Brent to Morris Downs of Sublot 28.

Tax Books of the Corporation of Washington.

(R., 69–77.)

These cover the years from 1826 to 1892. In 1826 Lots 1, 2, 3, 10 to 15 and 20 are assessed to Wm. Brent.

In 1846 Lot 3 is assessed to John Carroll Brent, and so continued until 1880.

In 1852 Lots 4 to 9, 16, 17 and 19 are assessed for the first time in the name of Wm. T. Baldwin.

In 1857 they are in the name of Christopher Ingle, trustee, and so continue through 1873.

In 1874, Lots 4, 5, 6, 7, 8 and 9 are assessed in the name of Joseph R. Ashley, and so remain through 1892.

The book for 1833 shows $500 for improvement opposite Lot 15.

In 1873 there is an improvement of $700 on Lot 3, which continued until 1882.

The general assessment books (R., 104–110), from 1802 to 1849, show the area in square feet of each lot corresponding to the ink numbers and areas. On the book for 1849, pencil areas are placed opposite the ink areas and in the next general assessment book, which was in 1854 (being made out every five years), shows square footage corresponding to the pencil changes on the other book. These books show the assessment to George Walker and the public and the respective lots allotted to each on the original division, with the number of square feet in each lot. Lot 18, 4,343¾ square feet, is assessed to James Davidson.

An alleged lease from Christopher Ingle, trustee, and Mary Baldwin, to Morris Downs (R., 36), of all that piece or parcel of land designated on the plat of said city as part of Lot 4 (what part not stated), in Square 939.

The Record from the Surveyor's Office of an Attempted Subdivision of Square 939 in Subdivision Book C. H. B. No. 1. (R. 57, 133, 134.)

Made in May, 1869, by some of the owners in order to

change the numbers of the several lots to correspond to the pencil numbers. There is no seal of the surveyor attached and this record was admitted in evidence under objection and exception on the proof of the signatures of John Carroll Brent and the two witnesses, Morgan and Chase.

Parol Evidence Introduced by Plaintiff.

Plaintiff offered considerable parol evidence in a vain attempt to show adverse possession in him and those under whom he claimed of the lots in controversy. This eventually became immaterial, *as claim of title by adverse possession was abandoned.*

He also introduced parol evidence tending to show an entry into possession and claim of title by other parties, of lots in different parts of the square according to the pencil numbers.

Plaintiff's Evidence Relative to Defendant's Possession.

MORRIS A. DOWNS (R., 55). Prior to 1890, Bradshaw had not possession of any part of that square. In 1890 Mr. Ashley came out one morning and knocked the fence down. I saw Mr. Bradshaw directing the putting up of that fence. Some little time after Mr. Ashley removed the fence. Mr. Bradshaw put a house on the corner of Ninth and B, which it took him two days to build, a little one-story house. The wire fence that Bradshaw put up in 1890 started at the corner of Ninth and ran up B street, within 17 feet of our present lot. It ran up Ninth street about, I should say, 150 feet, and then eastward, and ran from B street north, making a full enclosure. I saw Bradshaw directing where to put posts, etc.; he was superintending the job. It must have been a year and a half or two years after that, I guess,

before Mr. Ashley tore that fence down. Bradshaw afterwards put up a closed board fence, enclosing the place, around the same place where he had his wire fence. This was about 1893 or 1894.

JAMES A. ASHLEY (R., 61). On account of something I had heard, I went out to these lots on March 28, 1889, and found some posts and wires enclosing all that portion below the north line of Lot 6 pencil number. We gradually demolished that fence. That was February 21, 1890. Mr. Bradshaw was there and protested against it. I saw Bradshaw again in August, 1891. I demanded possession of him of that ground which was enclosed. He replied that his only connection with it was as lessee of Mr. Walter. Then I told him that it was as lessee and as the representative of Mr. Walter that we demanded possession, I and my associates, and he replied, "Of necessity, I refuse." I am referring to all the lots that were enclosed, 3, 4, 5 and 6. He had possession of all four of them. After I broke the fence down the property remained unenclosed a few days.

Plaintiff's Evidence of Acts of Ownership Over the Property in Question.

This is the testimony of James A. Ashley (R. 60, 61), and it is as follows:

> "Q. Mr. Ashley, what lots, if any, did your brother take possession of after this conveyance to him of Ingle and Mrs. Baldwin?
>
> "A. There were certain lots on Ninth street, beginning at the southwest corner of the square and running northward on that street. At that time there was a fence running east and west and along the northern border of the purchase which he said he had made; that fence, to the best of my recollec-

tion, extending back the depth of the lot. It was a post and rail fence. On the two northerly lots of which my brother took possession there were habitations—cheap structures, occupied by tenants, from whom my brother collected rent to his death, when I collected rents afterwards. The most northern of these two houses was occupied by Margaret Walker first and by Thomas Johnson afterwards. There was a double cabin near the line between Lots 8 and 9, which, I think, was astride the line, and that was occupied by Anthony A. Henry and others, and the most southerly one was occupied by Dennis Harrison. There was a more pretentious house, the largest of the three; collected rents of those tenants as late as May, 1889, I think. My brother died in March, and I went out there first in April following. I went out with him sometimes when he collected rents and saw money paid to him. As to other acts of ownership exercised over the ground after my brother bought from Mrs. Baldwin and others, he collected some small sums of money sometimes for sod. Harrison also made an allowance for the use of the lot south of his, where he pastured some cows. The sod was taken from the lots not occupied by the cabins—those extending from number 8 down to Ninth and B streets. We sold the sod to a man named Briscoe. The right of pasturage which we gave Harrison for a consideration covered all the sod from number 8 down to B street, the same lots from which we sold the sod. The right of pasturage was given to Harrison up to the time the sods were sold, which was in 1886. As to how early we gave him that right, I can not fix that date exactly. Harrison had the right of pasturage for several years prior to 1886. He pastured his cattle mainly out on the commons, and morning and evening he would allow the cattle to graze on those lots; I have seen them there."

Defendant introduced evidence tending to show that after the Downs house was removed he had loads of sand and stone piled on the southwest corner of the square; in rebuttal of this plaintiff introduced the following evidence (R. 135):

MORRIS A. DOWNS recalled:

> "As to the testimony in this case about loads of sand and stone being piled on the corner lot of Ninth and B streets—the southwest corner of Square 939—about the time that our house was moved over on Lot 2, nothing at all has been on that lot since the time our house was moved until it was fenced in by Mr. Bradshaw. I have lived there all the time. I am twenty-two years old, and was seven years old when our house was moved."

ELLEN F. DOWNS recalled (R. 138):

> "I never saw any sand or stone stored at the corner of Ninth and B before the wire fence was put there; it was a vacant lot. It was vacant after the Halfway house was moved and after our house was moved—after we sold to Mr. Ashley and moved the house from Lot 3 to Lot 2 it remained vacant and they played ball on it."

The sale to Ashley was in October, 1881 (R. 52), and the Downs' moved the house in 1882. (R. 64.)

The Halfway house was moved in 1869. (R. 62, 63.)

Defendant's Evidence.

The defendant introduced a mass of parol evidence tending to prove that the property in question was vacant and unoccupied for a long period of years, and that there had been no adverse possession of the same by anybody.

Also three deeds from the Ashleys, dated in October and November, 1886, conveying to different persons (R. 119) original lots 7, 8 and 9, now known as Sublots 10, 11 and 12. Plaintiff was permitted afterwards to introduce evidence tending to prove that these deeds were excuted without consideration and as a matter of courtesy and accommodation. (R. 134.)

Defendant offered to prove by Walter H. Acker, a witness on the stand, that prior to March, 1893, a loan of $20,000 had been made on the security of part of Lots 1, 2, 3 and 20, without notice of any claim now set up by plaintiff, and that with the proceeds of that loan six brick houses were built on Ninth street and on part of the property claimed in this suit; to which the plaintiff objected. The objection was sustained and exception taken. (R. 122.)

Defendant, denying that the plaintiff had made out a case, for the purpose of showing that he was not an intruder or trespasser; that he entered under claim of right, under conveyances from the heirs of George Walker, the original proprietor, gave in evidence the following:

The division between George Walker, the original proprietor, and the United States, of Square 939, made October 13th, 1792, showing that Lots 1, 2, 3, 10 to 15, and 20 were to remain in George Walker, and Lots 4 to 9 and 16 to 19 were allotted to the United States. (R. 124.)

Also, the records of a number of deeds from numerous grantors, reciting their relationship to George Walker, executed in Great Britain in 1889 and 1890, whereby they conveyed unto John H. Walter said Lots 1, 2, 3, 10 to 15 and 20, and other lots and squares.

Also the proceedings in Equity cause No. 12,676, John H. Walter *vs.* Ralph Walker et al. (remaining heirs of George Walker), for sale, to make partition of said lots, decree for sale, John Ridout, trustee, his report of sale, and final ratification. (R. 126.)

Also, deed from John Ridout, trustee, to John H. Walter, dated March 12, 1891, of Lots 1, 2, 3, and 20.

Deed from John H. Walter to Mary E. Bradshaw, September 6, 1892, of Lots 40, 41, 42, and 48 to 53 of Walter's subdivision of said Lots 1, 2, 3, and 20.

Deed from Mary E. Bradshaw and Aaron Bradshaw, her husband, September 13, 1892, to Lydia Hoagland of said subdivision lots.

Deeds from Lydia Hoagland, September 14, 1893, to Leda M. Morse of said Sublots 41 to 53.

Deed from Leda M. Morse to Aaron Bradshaw, October 28, 1893, of said Sublots 48 to 53. (R. 127.)

Agreement between the Walker heirs and J. Augustus Taylor and John H. Walter, January 31, 1889, reciting their ownership of certain real estate in the District of Columbia, that, for the purpose of converting the same into personality, they had conveyed the same to said John H. Walter, who had by deed of trust conveyed the same to John Ridout and James Lowndes to secure a note for $250,000. Said note and deed of trust are in fact to stand as security only for the net proceeds of sales after deducting compensation and outlays after referred to, and conferring certain powers upon said Taylor and Walter and providing for the disposition of proceeds from said real estate. (R. 127 *et seq.*)

Deed of release from Lowndes and Ridout, trustees, to Mary F. Bradshaw, recorded September 12, 1892, of said Sublots 40, 41, 42 and 48 to 53. (R. 131.)

The evidence of James Lowndes, that he is a member of the bar and acted as the agent and trustee of the representatives of George Walker and for James Walker. That in 1879 he made the acquaintance of a lady who claimed to be an heir of George Walker, and that, in response to a letter from her (in evidence, R. 131), of March 4, 1889, he consented to act as trustee, etc.

Three deeds of trust from John H. Walker to John Ridout and James Lowndes, each to secure J. Augustus Taylor, $100,000.

Upon the conclusion of the evidence, the defendant moved (R. 140) to strike from the record all testimony offered by the plaintiff relative to the pencil numbers or tending to show conveyance by or possession with reference to pencil numbers, which motion was denied by the court and exception taken.

Thereupon the plaintiff asked an instruction from the court, which appears on pages 140 and 141 of the Record, which was granted, and exception taken.

The defendant then asked eight separate instructions (R. 141, 142), each of which was denied and exception taken. The last of such instructions, No. 8, was, that upon all the evidence in this case their verdict should be in favor of the defendant.

The Record presents all the evidence in the case.

The charge of the court (R. 151), was simply an elaboration of the plaintiff's prayer; took from the consideration of the jury all questions as to title and left to them to decide solely as to the possession of the lots by plaintiff as set forth in the prayer granted.

The jury found for the plaintiff and the Court of Appeals affirmed the court below.

ASSIGNMENT OF ERRORS.

The court below erred:

1. In admitting the several items of evidence referred to in respect of said pencil numbers of said lots, and in denying defendant's motion in respect of the same (R. 140).

2. In admitting in evidence said De Kraft plat book.

3. In admitting in evidence the alleged subdivision of said square.

4. In granting said instruction to the jury prayed by the plaintiff.

5. In repeating said instruction in the charge to the jury.

6. In not granting defendant's prayer No. 8, that upon the whole evidence the verdict of the jury should be for the defendant.

7. In denying each of said instructions prayed by the defendant.

ARGUMENT.

The evidence as to the pencil numbers should not have been admitted by the court. The record was in ink. By whom and when the numbers in pencil were placed upon the records does not appear. Title could not be changed by numbering the lots in pencil. Conveyance of a lot by number, was of such number designated in ink on the plat, and entry upon a lot bearing the same number in pencil would not carry the title to that lot. A deed for Lot 15, would not convey Lot 18, even though it was supposed to be Lot 15.

The evidence introduced by the plaintiff shows conclusively, beyond any question or doubt, that in 1792, on the division with George Walker, the original proprietor, Lots 4 to 9, and 16 to 19, ink numbers, went to the United States, and the other lots remained in Walker. Appended to the certificate of division opposite each lot was placed the number of square feet in it. It also shows that the lots which, on the division, went to the United States were, with the exception of Lot 18, sold to William T. Baldwin, July 14, 1851. (R. 10).

The following is a copy of it:

Geo. Walker.		Public.		When Sold.	To Whom Sold.
Lots.	Sq. Feet.	Lots.	Sq. Feet.		
1	4,343¾	4	6,460		
2	4,871	5	6,460		
3	6,460	6	6,460		
10	5,955¼	7	4,871		
11	4,343¾	8	4,343¾	July 4, 1851..... Jas. Greenleaf.	Wm. T. Baldwin.
12	4,871	9	5,955¼		
13	6,460	16	6,460		
14	6,460	17	4,871		
15	6,460	18	4,343¾		
20	5,955¼	19	5,955¼	July 14, 1851.....	Wm. T. Baldwin.
	56,180		56,180		

The proceedings in the High Court of Chancery of Maryland *vs.* Greenleaf, Morris & Nicholson et al., in which Kilty and King were appointed trustees to sell (R. 54) Lot 18, Square 939 is reported as sold to James Davidson. In the schedule accompanying the report, Lot 18 is described as containing 4,343¼ square feet. Pencil number 18 is Lot 15 ink number, and contains 6,460 square feet. It further appears that the whole number of feet in the square was 112,360; and that the division was an equal one, as it was required to be, 56,180 square feet to the United States and the same number to Walker. If the United States had taken according to the pencil numbers, it would have had 60,894 square feet.

Ledger from the office of the Commissioner of Public Buildings, pp. 174, 175 (R. 30).

> "Account of sales of city lots, period 1851. July 14, By Cash received of Wm. T. Baldwin for lots numbered 4, 5, 6, 7, 8, 9, 16, 17 and 19 in Square number 939, containing 51,855 square feet, at ¼ cents per foot, $129.64."

Also the tax and assessment books of the corporation of Washington. (R. 69 *et seq.* and 104 *et seq.*)

The *plaintiff's declarations in this case* also show that the record in ink is the true one. It would be a monstrous proposition that pencil memoranda placed upon a public record could change or affect the title to property.

Plaintiff Has No Record Title.

The United States conveyed to Baldwin in 1851, Lots 4 to 9 and 16, 17 and 19, being all it owned in the square. (R. 42). Ingle, trustee, of the Baldwin Lots, in August, 1872, conveyed to Ashley lots 4, 5, 6, 7, 8 and 9, lying wholly north of the property in controversy here. This deed could not and did not convey any title to Lots 1, 2, and 3, the lots

in dispute. Yet the plaintiff, as one of the heirs of Ashley, the grantee of Ingle, trustee, has no other title and does not claim to have.

As to Lot 20. (Pencil No. 3.)

In August, 1822, the corporation of Washington conveyed to Wm. Brent, lots 1, 2, 3, 10 to 15 and 20, sold for nonpayment of taxes. (R. 26.) These lots, it will be observed, are those which under the division in 1792 remained in George Walker, original proprietor.

It was not claimed on the trial, and could not be, that this deed passed any title to the lots it purported to convey.

In 1844, Wm. Brent conveyed Lot 3 to John Carroll Brent. (P. 28).

In August, 1868, John Carroll Brent conveyed to Morris Downs—

> "lot or piece of ground situated in said city of Washington known on the plat thereof as lot number 3 in Square 929." (R. 52.)

In 1879, Downs conveyed to Campbell Lot 3, describing it as fronting on B street, and in September, 1881, Campbell reconveyed to Downs, with the same description.

In October, 1881, Downs conveyed Lot 3, Square 939, no particular description, to the Ashleys; and the plaintiff claims Lot 20 under this conveyance of Lot 3.

It is manifest that whatever title Wm. Brent got under his tax deed to Lot 3 was to Lot 3 fronting on Tenth street, and this he conveyed to John Carroll Brent, who conveyed to Downs, who conveyed to the Ashleys. Downs never was in possession of Lot 3, and the conveyance by him of Lot 3, to the Ashleys not only gave them no right to the possession of Lot 20, but gave them no right to avail themselves of his possession of Lot 20.

The Brent tax title to Lots 1, 2, and 20 appears to still

remain in some of the Brent heirs, although in the chancery proceedings referred to they are treated as pencil Lots 1, 2 and 20, at the southeast corner of the square, being Lots 17, 18 and 19, which had never been sold for taxes.

Thus this plaintiff, without any record title whatever to these Lots 1, 2, 3 and 20; without any conveyance of them from anybody even ever in possession of them; and without any claim to title by adverse possession himself, claims the right to recover the fee simple title to the property in an action of ejectment.

In all cases in which the plaintiff seeks to recover on proof of adverse possession for twenty years, or the defendant to defend on the same ground, when the possession has been held by different persons for the twenty years, it is a familiar rule that in order to tack the possessions together, there must be shown a privity of estate between them, either grantee, heir, or devisee.

Tyler on Eject., 915.
Davis *vs.* Furlow, 27 Md. 536.

In those jurisdictions where recovery is permitted on proof alone of prior possession, short of twenty years, and the plaintiff seeks to avail himself of the prior possession of another under whom he claims, he must show a valid conveyance from such party.

Plume *vs.* Seward, 4 Cal. 95.
Caldwell *vs.* Carter, 89 Am. Dec. 131.

What that claim is based upon appears from the instruction, at his instance, granted by the court. For convenience it is printed here.

Plaintiff's prayer, granted by the court. (R. 140):

> "If the jury believe from the evidence that Morris Downs took possession, in 1868, of the lot referred to in the testimony as pencil number 3, fronting on B street, under his purchase of lot 3 from John Carroll

Brent; that he held and occupied said lot as a place of residence for himself and his family exclusively, claiming it as his own, until his conveyance of the same to the plaintiff and his cograntees in 1881; that he paid rent therefor to the plaintiff and his cograntees until 1882, and that since said last-mentioned date and until the defendant entered thereon, if the jury find from the evidence that he did so enter, the plaintiff and his cograntees continued to exercise acts of exclusive ownership over the said lot, to pay taxes thereon, and to claim title thereto, and that they had never abandoned the same nor their claims to be owners thereon; and if they further find from the evidence that Tyler Baldwin and those claiming under him were in actual exclusive possession of the lots referred to in the evidence as pencil numbers 4, 5 and 6, cultivating and paying taxes thereon and claiming them as their own from the time of his purchase of lots 4, 5, 6, and others from the United States in 1851 until some time during the war, and that thereafter those claiming under him continued to claim exclusive title thereto, pay the taxes thereon, renting the same or parts thereof from time to time, sold sods therefrom, and gave their tenants permission to pasture cows thereon and that the right of pasturage so given was actually exercised by said tenants down to about the time the defendant entered upon said lots, if the jury find from the evidence that he did so enter, and that the plaintiff and others claiming under the said Baldwin have never abandoned the said lots nor their claim to be the owners thereof; and if the jury further believe from the evidence that the defendant, Aaron Bradshaw, in or about the month of March, 1889, without the knowledge or consent of the plaintiff and others claiming under the said Downs and Baldwin, entered upon the lots known as pencil numbers 3, 4, 5 and 6, and enclosed them with a fence; that he was in possession of all of said lots on the 13th day of October, 1891, when the original declaration in this cause was filed, and that he continued in possession of all of said lots until March 11, 1893, when the first amended declaration was filed and subsequently; and if the jury further believe from the

evidence that Joseph R. Ashley, the grantee in the deed from Christopher Ingle and Mary Baldwin, died intestate in 1875, and that he left as his only heirs-at-law two sisters and three brothers, of whom the plaintiff is one, then their verdict should be in favor of the plaintiff for the undivided parts of the lots in controversy claimed by him in the declaration."

This instruction relates, first, to pencil Lot 3 (Lot 20), and second, to pencil Lots 4, 5, and 6 (Lots 1, 2, 3), united in the one prayer.

First, as to Pencil Lot 3 (Lot 20).

The court in this instruction said to the jury, if Morris Downs took possession of Lot 20 in 1868, under his purchase of Lot 3 from John Carroll Brent, and occupied said lot as a residence for himself and family exclusively, claiming it as his own, "until his conveyance of the same to the plaintiff and his cograntees in 1881," (here, it will be observed that the court held as matter of law that the conveyance by Downs of Lot 3 to the Ashleys, passed whatever title he had to or interest in Lot 20); that he paid rent to his grantees, the Ashleys, until 1882, and since then and until the defendant entered, the plaintiff and his cograntees continued to exercise acts of exclusive ownership over the lot, to pay taxes thereon and claim title thereto and that they had never abandoned the same nor their claims to be owners; and that the defendant, in March, 1889, entered upon and continued in possession of the property until after March 11, 1893, then the plaintiff was entitled to recover, notwithstanding the fact that for seven years prior to the defendant's entry the lot had been vacant and unoccupied, and notwithstanding the further fact that the defendant claimed to have entered as the agent of Walter, who claimed to be the grantee of the heirs of George Walker, the original proprietor.

As to Pencil Lots 4, 5 and 6 (Lots 1, 2 and 3).

The instruction as to these is very similar to the foregoing, except that the acts of ownership are defined as from time to time selling sods and giving tenants permission to pasture cows; and, quite incidentally, that the plaintiff claims under Baldwin.

As we have seen from the testimony of James A. Ashley (R. 60, 61), after his brother acquired the Baldwin title to Lots 4, 5, 6, 7, 8 and 9, there were some small shanties or cabins on 5 and 6, from the occupants of which rents were collected, and that one Harrison, who occupied the southernmost cabin, was given the right to pasture some cows from pencil Lot 8 down to B street; this was for several years prior to 1886. In 1886 some sods were sold to a man by the name of Briscoe. After 1886 nothing at all is claimed to have been done upon the lots. There is no evidence whatever that the Ashleys ever were in actual possession of these lots. Under these circumstances the court tells the jury that such constructive possession under claim but without evidence of title is sufficient to enable the plaintiff to recover, unless the defendant proves a clear legal title in himself.

If this is the law, then it will create a radical change in legal principles heretofore supposed to control proceedings in ejectment.

This instruction was granted by the court upon the authority of Smith *vs.* Lorillard, 10 John. 337, 344, 354. The court in that case had charged the jury that the plaintiff had shown an actual and undisturbed possession for seven or eight years at least, which was sufficient to entitle him to recover, unless the defendant had shown an adverse possession of twenty years, or a subsisting title out of the lessors of the plaintiff.

In the case at bar there was not only no actual possession by the plaintiff, but the legal title was shown by him to be outstanding in George Walker or his heirs.

In some of the States a similar doctrine has been advanced. But such has never heretofore been considered the law in this District.

In this jurisdiction, except when both parties claim under a common source of title, it has always been held that the plaintiff can only recover on the strength of his own title. He must prove that at the time of suit brought he had the legal title and right of possession, and to do this must show title out of the United States.

The possession held by the defendant is presumptive evidence of a right of possession, and he can not be deprived of his possession by any other than the rightful owner.

McHenry on Eject., 115.
24 How. 398, 403; Smith *vs.* McCann.
7 G. & J., 61, 72; Medley *vs.* Williams.
11 G. & J., 358; Wilson *vs.* Inloes.
30 Md., 536, 545; Lannay *vs.* Wilson.
70 Md., 305, 318; Winter *vs.* White.
4 Md., 138, 173, 174; Hammond *vs.* Inloes.
21 How., 481; Fenn *vs.* Holme.
24 How., 423; Shierbun *vs.* Cordova.
113 U. S., 550, 555; Fussell *vs.* Gregg.
94 U. S., 773; Hogan *vs.* Kurtz.
2 Mack., 275; Anderson *vs.* Smith.
6 App. D. C., 273; Peck *vs.* Heurich.

This court has uniformly held, in all cases involving title to real estate, that the law of the State where the land lies, as evidenced by the decisions of its judicial tribunals, is a rule of property and binding upon the court.

See the opinion of the court as delivered by Chief Justice Taney in Smith *vs.* McCann, *supra.*

91 U. S. 357; Morsell *vs.* First National Bank.
136 U. S. 519; Thaw *vs.* Ritchie.
165 U. S. 566; De Vaughn *vs.* Hutchinson.

This latter case involved the application of the rule in Shelley's Case in this District. The opinion of the court, delivered by Mr. Justice Shiras, states (p. 570) as follows:

> "It is a principle firmly established that to the law of the State in which the land is situated we must look for the rules which govern its descent, alienation and transfer, and for the effect and construction of wills and other conveyances. United States *vs.* Crosby, 7 Cranch. 115; Clark *vs.* Graham, 6 Wheat. 577; McGoon *vs.* Scales, 9 Wall. 23; Brine *vs.* Insurance Co., 96 U. S. 627.
>
> "Accordingly, in the present case, we are relieved from a consideration of the innumerable cases in which the courts in England and in the several States of this Union have dealt with the origin and application of the rule in Shelley's Case. We have only to do with that famous rule as expounded and applied by the courts of Maryland while the land in question formed part of the territory of that State, and to further inquire whether, since the cession of the lands forming the District of Columbia, there has been any change in the law by legislation of Congress."

There are numerous other cases in this court to the same effect, but the principle is such a familiar one, it is deemed unnecessary to cite them.

The doctrine of Smith *vs.* Lorillard has been repudiated in Maryland: see—

1 Md., 44–52–3; Mitchell *vs.* Mitchell (1851).

In this case plaintiff did not show title out of the State, but did show adverse possession for more than 20 years, from 1817 to 1841, and admitted heirship. Defendant, claiming as heir of the half-blood, had entered, was in possession, but without right or title. Judgment in favor of defendant affirmed. The opinion states—

> "From the facts in the case, it appears that the defendant was in possession of the *locus in quo*, from

1841, to the time of the institution of the suit claiming it as the property of his son.

"The general principles of ejectment law in Maryland have been settled by a long series of unvarying decisions, and can not be disturbed by this court, however hard may be their operation in particular cases. Among these, is, that the plaintiff must recover, if at all, on the strength of his own title, and can not do so because of the weakness of that of the defendant. Another, is, that he must show that he has the *legal* title to the land, *and* a right of possession, and that he can not establish such legal right in himself, without first showing the land has been granted by the State. The cases in 2 H. & J., 125; 11 G. & J., 358, and 3 H. & J., 26, are full on these points. They merely affirm what has always been the law of Maryland.

"But it is said, that the act of 1818, ch. 90, has effected a change in some of these doctrines, at least so far as the cases which it embraces are concerned. Were it not for the act of 1818, on the evidence in the case before us, it must be admitted, the plaintiff could not recover, whatever might be his position, according to the decisions in England, and of some of our sister States, in which it has been held, that *priority* of, and greater length of possession, is all that need be shewn by the plaintiff, when the defendant relies *solely* upon a possession of a lesser duration in point of time. See 7 *Bing.*, 156; 10 *Johns.*, 356; 2 *Sergt. and Rawle*, 57."

The exceptional cases in those jurisdictions which justify a recovery on proof of prior possession, are all cases of actual, visible possession; and not where the entry of the defendant was upon vacant unoccupied land.

The Cases in this Court are the following:

Christy *vs.* Scott, 4 How. 282, 292.

This was a case of Mexican title, in which the plaintiff

in his petition averred that on a certain date he was seized in his demesne as of fee of three tracts of land, fully described in the petition by metes and bounds, and that the defendant, with force and arms, ejected him therefrom and has kept him out of possession thereof. The defendant filed an answer containing several distinct pleas, and the case came up on demurrers to these pleas.

The plea to the plaintiff's averment of seisin in fee and ouster by the defendant was, not denying this, that, if the plaintiff had any paper title, it was under a certain grant which was not valid and showed no title in the plaintiff.

This court, in holding the pleas bad on demurrer, in the course of its opinion stated, that if the plaintiff had actual prior possession of the land, this is strong enough to enable him to recover from a mere trespasser who entered without any title.

Burt *vs.* Panjaud, 99 U. S. 180.

This case came up from the Circuit Court for the Northern District of Florida. Two lots were in question. One lot had two houses on it, one of which the plaintiff occupied; the other lot was leased to a tenant. The court instructed the jury that if the plaintiff's possession had continued for *seven years*, it was sufficient to enable her to recover against a trespasser, or one showing no right to enter.

This court, in holding that there was no error in this instruction, cites the statement from 2 Greenleaf on Evidence, that either actual possession of the premises or receipt of rent is *prima facie* evidence of title in fee. The case is very briefly reported, and what the facts were does not very clearly appear. Mr. Justice Strong dissented, on the ground that the evidence of plaintiff's possession was not sufficient to raise the presumption of title.

Sabariego *vs.* Maverick, 124 U. S. 261, 296.

This was an action of trespass to try title from the Circuit Court for the Western District of Texas.

Title was shown to have been in one Losoya under a grant from the King of Spain. A deed from a board of commissioners to one Garcia, based, according to the recitals, upon a confiscation of the property of Losoya by the Spanish government in 1814. Plaintiff claimed as sole heir at law of Garcia.

Various documents and parol testimony were offered tending to show confiscation, but no decree of confiscation was offered in evidence.

The court, holding that the proofs did not show any decree or adjudication of confiscation sufficient to warrant the sale, directed a verdict for the defendants. This court affirmed the judgment, holding that the evidence of possession on the part of plaintiff, which seemed to have been from 1814 to 1835, did not satisfy the rule as stated by the authorities cited, as it did not show any evidence of possession after 1835, but left the period from 1835 to 1843, when it was alleged that the defendant entered, entirely unaccounted for.

That *actual prior possession* is necessary in New York is shown by the case of Greenleaf *vs.* Brooklyn, etc., Rwy. Co., 141 N. Y. 395, 399, in which the court says:

> "Mere payment of taxes, claim of title, assertions of ownership made even upon the land; mere words, however emphatic, do not show the *actual possession* which raises the presumption of title sufficient to maintain ejectment."

If the instruction granted by the court below is sustained, then all that the plaintiff need do in an action of ejectment is to show that at some previous time he was in the pos-

session of the property or exercised some act of ownership over it, and he will be entitled to recover unless the defendant can show a legal title to the property, no matter how rightfully he had entered. In other words, it simply reverses the rule hitherto supposed to prevail, that the plaintiff can recover solely on the strength of his own title and not on the weakness of his adversaries.

The rule applicable to cases of actual possession by the plaintiff and entry and ouster by the defendant as a trespasser have no application in this case as no such question was left to the jury. The land was conceded to have been unoccupied and vacant for several years prior to defendant's entry, and the instruction was based solely upon plaintiff's quasi-possession, which was held as matter of law sufficient to entitle him to recover, whether the defendant entered as a trespasser or wrongdoer or in good faith under a claim of right and title.

Our law provides a remedy in case of forcible entry or forcible detainer.

Rev. St. D. C., Sec. 684.

20 D. C. 317, Jennings *vs.* Webb.

119 U. S. 610, Iron Mountain & H. RR. *vs.* Johnson

While ejectment may also lie in such cases, yet it must appear to have been a forcible entry upon an actual occupation by another, or a peaceable entry and a forcible detainer of such occupation.

In the case at bar there was no evidence tending to show that the Ashleys had ever been in possession of Lots 1, 2 and 3, and the evidence as to Lot 20 (pencil number 3) was, that it had been vacant and unoccupied for seven years prior to the defendant's entry.

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It was under these circumstances that the plaintiff, who had shown that he did not hold the record legal title; that the legal title was outstanding in the Walker heirs, and that he had no title by adverse possession, was permitted to recover.

The plaintiff's own testimony (R. 61) showed that prior to March 28, 1889, the defendant had enclosed all four lots with a wire fence, and that they so remained for about one year, when the plaintiff demolished the fence, and that the defendant thereupon erected a small brick building upon the premises and took and held actual possession of the lots.

Plaintiff has shown legal title outstanding in George Walker, the original proprietor, and was therefore not entitled to recover.

It is a familiar rule of law that the defendant in ejectment can always prevent a recovery by showing the outstanding legal title to be in a stranger.

In this case the plaintiff has shown the legal title to be outstanding in George Walker or his heirs, and doesn't pretend to connect himself in any way with that title.

Even under the New York rule permitting recovery on proof of prior possession, it was on an alleged presumption of title from proof of possession, but where the actual title was shown to be outstanding in a stranger, the plaintiff could not recover.

1 Hill, 121, 128, Gillett *vs.* Stanley.
1 Hill, 130, 138, Bloom *vs.* Burdick.

The legal logic of the New York and similar cases is, that proof of possession, in the absence of evidence of title, raises a presumption of title; and the plaintiff will be en-

titled to recover, unless the defendant shows a prior possession or legal title in himself.

But in this jurisdiction there can be no presumption of title against the United States, and hence no proof of possession either for a short time or for more than twenty years will enable a plaintiff to recover unless title is shown out of the United States, in which the court takes judicial notice, the title was vested.

But when plaintiff, to meet this necessity of his case, shows title out of the United States he has shown the legal title to be in some one else, and this title thus shown can only be overcome by proof of a grant or by twenty years' adverse possession.

When a plaintiff has shown the legal title outstanding, proof of actual possession, short of twenty years, not only raises no presumption of title, but simply shows that the plaintiff himself had no right of entry.

De Kraft's Plat Book, (R. 18 to 24).

This was a plat book of the squares in the city prepared by the Surveyor, De Kraft, in 1816, under authority of the Corporation of Washington, showing that in Squares 939 and 749, Lot No. 1 in each is at the southeast corner of the square.

It ought to be sufficient to say that no plats published by direction of the municipal authorities could change or affect titles to real estate as shown by the original and authentic records relating to the different squares in the city.

The attempted Subdivision of this Square in May, 1869, C. H. B., No. 1 of the Surveyor's office. (R. 57, 134.)

This was admitted, although not made by all the owners

of lots in the square and although the certificate of the Surveyor *was not under seal.*

Secs. 477 to 479, Rev. St. D. C., taken from the original act of 1809, show that this was not a lawful subdivision, and therefore not admissible in evidence.

It was an attempt on the part of some of the owners in the square to obtain title by changing the numbers of the lots, for the only difference between the original plat of the square and this is, that in the subdivision Lot 1 begins at the southeast corner.

It will be noted that on its face it shows that original Lots 1 to 20 were differently located.

It is respectfully submitted that so radical a change in the law and practice relative to actions of ejectment in this District, as the affirmation of the judgment of the court below would effect, would be productive of litigation, upset titles and destroy what has hitherto been regarded as a settled and beneficial rule of property.

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